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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 470

ALVIN E. SANDROFF AND THOMAS PAPER STOCK COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 239–248) is reported at 174 F. 2d 1014.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1949 (R. 239), and a petition for rehearing was denied on October 13, 1949 (R. 255). On November 10, 1949, Mr. Justice Reed extended the time for filing a petition for a writ of certiorari to and including December 1, 1949 (R. 255), and the petition was filed on that date. The jurisdiction of this Court is invoked under

28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the indictment charged and the proof established a conspiracy to make and keep false records of transactions in commercially packed wastepaper in violation of the Emergency Price Control Act of 1942 and the applicable regulations thereunder, and whether the trial court's instructions properly defined the offense charged.

2. Whether the overt acts alleged and proved to have been committed in the trial district were overt acts in furtherance of the object of the conspiracy.

3. Whether the trial judge's charge to the jury was unfair and prejudicial to petitioners.

4. Whether the trial court in imposing sentence acted contrary to Rule 32 of the Federal Rules of Criminal Procedure.

STATUTES, REGULATIONS, AND RULES INVOLVED

These are set forth in the Appendix, *infra,* pp. 18–21.

STATEMENT

Petitioners Sandroff and Thomas Paper Stock Company, a corporation (hereafter called the Thomas Company), were indicted under Section 37 of the Criminal Code (18 U. S. C. [1940 ed.] 88), *infra,* p. 18, for conspiring with Charles Ginns, Jacob Moss, and Jack Ginns, none of

whom were indicted, to commit an offense against the United States by violating Section 205 (b) of the Emergency Price Control Act of 1942, as amended, *infra,* p. 19, and Section 1347.10 of Maximum Price Regulation No. 30, *infra,* pp. 19–20 (R. 6–13). It was alleged that between September 25 and November 15, 1943, petitioners and the co-conspirators conspired that the latter would keep records of wastepaper sales to petitioners which would falsely state the price of the paper, so that they might secure and petitioners might pay a price for the paper in excess of that permitted by the Emergency Price Control Act and MPR No. 30 (R. 7, 8).

The evidence at petitioners' second trial[1] may be summarized as follows:

Charles Ginns and his partner, Moss, were dealers in wastepaper in Detroit, Michigan, operating under the name of Central Waste Materials Company (hereafter called the Central Company) (R. 14, 15). About October 5, 1943, Charles Ginns received a call from petitioner Sandroff, the president, "who dictate[d] the rules" of the Thomas Company (R. 124, 125, 107), asking him to come to Sandroff's Chicago office because it would be worth his while (R. 15, 105).

[1] Petitioners' convictions on an earlier trial were reversed for error in restricting the cross-examination of government witness Charles Ginns in respect of promised or expected immunity. See R. 240 and *Sandroff* v. *United States*, 158 F. 2d 623 (C. A. 6).

When Charles Ginns went there with his son Jack,[2] Sandroff said that because of the shortage of wastepaper he would pay him $10.00 a ton above the O. P. A. ceiling price for corrugated paper and $6.00 a ton over ceiling for newspaper. Sandroff told Ginns to go back to Detroit and buy paper from all available sources, that the invoices should be at the ceiling prices, and that he would pay cash at the end of each week for the over-ceiling balance. Charles Ginns received from Sandroff a Thomas Company check for $1,000 on account, went back to Detroit, and started buying paper. (R. 16, 17, 105, 106, 107.)

After Crane, one of Sandroff's salesmen, went to Detroit to buy paper because Charles Ginns was not sending enough (R. 21), Charles and Jack Ginns went to Chicago and complained to Sandroff, who promised that he would not thereafter send Crane to Detroit (R. 22, 108). At this meeting, Sandroff had his employee, Mrs. McGregor, make up a purchase order for 15 cars of corrugated paper and 15 cars of newspaper at ceiling prices (Ex. 2, R. 192–193, 23), but the oral agreement was reiterated that the balance of the over-ceiling price would be paid in cash at the end of the week (R. 23, 24, 109). Charles Ginns was given a $2,000 advance on this visit (R. 25, 109, 194).

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[2] Jack Ginns bought paper for his father and received a one-third commission on business he brought in (R. 64).

Charles Ginns testified that his company baled the paper they bought (R. 14), and that the shipments to the Thomas Company shown in Exhibits 4 through 12 were of baled paper (R. 37). He also stated that Sandroff had told him that it was not necessary to bale the paper, but that the peddlers could put it directly into the cars the way they found it (R. 66). Jack Ginns' testimony was that all the paper sent to the Thomas Company was baled (R. 123), although Sandroff had said the paper could be shipped in any form (R. 117).

The Government's evidence included a mass of exhibits of shipping memoranda or invoices with bills of lading showing that the Central Company billed the Thomas Company at ceiling prices (Exs. 4–12, R. 194–195, 34, 35; Exs. 13–21, R. 196, 35, 36; Exs. 24–34, R. 198–199, 45, 47; Exs. 35–45, R. 199, 45, 47; Exs. 48–58, R. 200–201, 48, 50; Exs. 59–69, R. 201–202, 48, 50; Exs. 71–77, R. 202–203, 52; Exs. 78–84, R. 203, 52). The evidence further showed over-ceiling payments in Chicago by Bert Derdiger, the Thomas Company office manager,[3] to Jack Ginns of $1,100 cash on October 18 (R. 111), $1,100 on October 25 (R. 112), and $650 by check on November 8, 1943 (R. 113, 114).

[3] Derdiger admitted that he was instructed regarding the payments by Sandroff or Mrs. McGregor; that on several occasions he went to the bank with Jack Ginns and gave him cash or turned it over to Sandroff; and that the extra money paid to Jack Ginns was "around from two to three thousand dollars" (R. 124, 128, 130).

On November 1, Charles Ginns received an overceiling payment of $1,150 by check from Sandroff himself (R. 51, 202).

The jury found both petitioners guilty (R. 189). Petitioner Sandroff was sentenced to imprisonment for one year and one day and fined $10,000 and the corporation was also fined $10,000 (R. 191). The Court of Appeals affirmed the convictions (R. 239–248).

ARGUMENT

1. Section 1347.10 (b) of MPR No. 30, *infra*, pp. 19–20, provided that "Every person making purchases or sales of commercially packed wastepaper shall keep for inspection * * * complete and accurate records of each purchase or sale of wastepaper showing", *inter alia*, "(5) Prices paid or received", and Section 1347.11 (a) (5), *infra*, p. 20, defined "commercially packed" as meaning "packed in machine compressed bales or by an optional method of packing where such method is allowed in the definition of a grade."

It is not denied that Sandroff and the Ginns evolved a scheme to falsify the Central Company's records of the prices received from the Thomas Company for wastepaper sold to it. Petitioners contend, however, that there was neither charge nor proof of a conspiracy involving commercially packed wastepaper; that the scheme involved only non-commercially packed paper not covered by Section 1347.10 (b), *supra*.

They also contend that the trial judge failed in his instructions to explain that petitioners could be convicted only if the jury found a conspiracy to falsify records of transactions in commercially packed paper. (Pet. 11–23.)

The indictment, in pertinent part (R. 7–8), charged that petitioners, and the co-conspirators "did unlawfully * * * conspire * * * to commit an offense against the United States of America and the laws thereof, that is to say: to violate Par. (b) of Sec. 205 of the Emergency Price Control Act * * * and Sec. 1347.10 of Maximum Price Regulation No. 30 * * *; that the said defendants and said co-conspirators * * * did unlawfully * * * conspire to make and keep false * * * records of proposed waste paper sales by co-conspirators * * * to defendants * * *; said defendants and said co-conspirators * * * well knowing that Section 1347.10 of said Maximum Price Regulation No. 30 * * * requires * * * that all persons making purchases and sales of commercially packed waste paper shall keep correct records of each such purchase and sale * * *; it being the purpose and plan of the said defendants and * * * co-conspirators * * * to make and to keep records of proposed waste paper dealings between [them] that would falsely, inaccurately and incompletely reflect the record the particular grade, quantity and price of the waste

paper proposed to be purchased by the said defendants from the said co-conspirators * * * to the end that said co-conspirators * * * might secure and defendants * * * might pay a price for waste paper in excess of that permitted to be paid and received under the said Emergency Price Control Act of 1942 * * * and said Maximum Price Regulation No. 30 * * *." We submit that the indictment was sufficient to charge a conspiracy to make and keep false records of sales of "commercially packed waste paper." It expressly referred to Section 1347.10 of MPR No. 30 and charged that the conspirators knew of its requirements in respect of sales of commercially packed waste-paper. Obviously, the sales and records referred to in the other parts of this paragraph of the indictment were sales and records involving such paper. It is not necessary to use "the same degree of detail in an indictment for conspiracy in stating the object of the conspiracy as if it were one charging the substantive offense." *Thornton* v. *United States,* 271 U. S. 414, 423. Certainty, to a common intent, sufficient to identify the offense which petitioners conspired to commit was all that was required. *Williamson* v. *United States,* 207 U. S. 425, 447, 449. Cf. *Glasser* v. *United States,* 315 U. S. 60, 66; *Wong Tai* v. *United States* 273 U S. 77, 81. The Court of Appeals properly decided on the former appeal (158 F. 2d 623, 624) that "the indictment

was sufficiently well drawn to embrace the essential elements of the conspiracy charged" and "to apprise adequately the defendants of the charges required to be met".

Petitioners' contention that the evidence did not establish a conspiracy to falsify records of transactions in commercially packed wastepaper is based upon the testimony of Charles and Jack Ginns on cross-examination that petitioner Sandroff told them they could ship the paper unbaled just as they received it from peddlers (R. 66, 117; see p. 5, *supra*). There was no evidence, however, that Sandroff directed them to ship the paper in that form. And as a matter of fact all the paper involved in the conspiracy was baled (R. 123; see p. 5, *supra*). Sandroff must have known of this from the invoices, and he continued to make or direct payment of the agreed over-ceiling prices to the Ginns (R. 51, 128).

The fact that there was no direct evidence of a formal initial agreement specifically embracing baled wastepaper does not negate the existence of a conspiracy to falsify the records of transactions in such paper. The agreement broadly covered wastepaper and the very testimony of the Ginns upon which petitioners rely shows that Sandroff wanted all the paper they could supply, baled or unbaled. The subsequent acts of the conspirators in dealing in baled paper also supports the inference that their agreement was to falsify the Central Company's records of such transactions. The

fact that the original agreement also embraced non-commercially packed paper does not exculpate petitioners.

Neither is there any merit in petitioners' assertion that the trial court's instructions did not point out the necessity of a finding that the conspiracy contemplated dealings in commercially packed wastepaper. The record does not show any objection or exception by petitioners' counsel on this score, as required by Rule 30, F. R. Crim. P., and it is clear in any event that the instructions sufficiently apprised the jury that the charge against petitioners involved only a conspiracy to falsify records of sales of baled paper. On the prior appeal, the Court of Appeals directed that on re-trial, "the court should explain to the jury the pertinent provisions of the Emergency Price Control Act and, especially, should the language of the pertinent portion of Section 1347.10 of Maximum Price Regulation No. 30 be read and explained to the jury." 158 F. 2d at 630. In complying with this mandate, the trial court in its instructions read the provisions of Section 1347.10 (R. 156–157) and the definition of commercially packed paper contained in Section 1347.11 (a) (5) (R. 158). He also explained what baling meant (*ibid.*). In addition, the court also read from the indictment the provisions of Section 1347.10 regarding commercially packed wastepaper (R. 160). We think the Court of Appeals was right in holding that the trial

court had complied with its directions on the first appeal and that the "jury was sufficiently informed that the conspiracy charged related essentially to dealings in 'commercially packed' waste paper" (R. 241).

2. Equally untenable is petitioners' contention that the District Court lacked jurisdiction and venue because the overt acts committed within the district were not in furtherance of the conspiracy (Pet. 23–25). Overt acts I through V alleged shipments of wastepaper in furtherance of the conspiracy from Detroit, "in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court", by co-conspirator Charles Ginns to petitioners (R. 8–10). Though the conspiracy was formed in Chicago, it was prosecutable in the Eastern District of Michigan if overt acts in furtherance of the conspiracy were committed there. See Section 42, Judicial Code, 28 U. S. C. [1940 ed.] 103, *infra*, p. 18; *Hyde* v. *United States*, 225 U. S. 347; *Brown* v. *Elliott*, 225 U. S. 392; *Gayon* v. *McCarthy*, 252 U. S. 171.

It is clear that the shipments in question were overt acts for the purpose of effecting and accomplishing the object of the conspiracy to make and keep false records so that petitioners might pay over-ceiling prices for wastepaper. Such shipments were indeed the ultimate object of the conspiracy, of which falsification of the Central Company's records was an integral part. Without

them there would have been no occasion for making false records, as the conspiracy contemplated. As the Court of Appeals said, "The shipments of paper were essential overt acts to effectuate the object of the conspiracy" (R. 244).

3. Petitioners complain of three short passages which they have excerpted from the trial court's instructions covering 32 pages of the record (R. 150–182). These objections are frivolous.

First, it is urged that the court's reading of Section 1 (a) of the Emergency Price Control Act (R. 151–152), with its references to "profiteering, hoarding, manipulation, speculation, and other disruptive practices" (R. 151–152), constituted "an appeal to the passions and prejudices of the jury" (Pet. 26). This occurred in the early part of the charge, when the court was explaining the statute and regulations involved in the case. At the conclusion of the charge, after the court had excused the jury to hear exceptions (R. 182), petitioners' counsel objected to this passage, among others (R. 184). When the jury was recalled to receive further instructions as the result of the exceptions made by counsel, the court adverted to its earlier references to the statute and explained (R. 185):

> Also, the court explained to the jury certain passages of the Emergency Price Control Act. The court did that, because the court felt that a short background of the act should be given for a better and fuller

> understanding of the law by the jurors, and not with any other purpose in view.

There was no further objection on this score (see R. 186–187) and it is clear from the whole context that petitioners were not prejudiced as they claim.

Next, it is contended that petitioners were prejudiced by the court's references in the main charge to the Ginns as "co-conspirators" and to the criminal liability of a person who knowingly joins an existing conspiracy (Pet. 26–27). When these instructions were called to the court's attention at the conclusion of the charge, the court agreed that the references to "co-conspirators" should be corrected and that the instructions concerning a person who joins a conspiracy were inapplicable in this case (R. 182–183). Accordingly, when the jury were recalled, the court effectively corrected and clarified its earlier instructions (R. 184–185):

> In the charge of the court to the jury, the court referred on a number of occasions to the conspirators, or co-conspirators. The court did not intend to have the jurors understand that the court has any preconceived notions that the defendants or either of them have already been stamped by law as conspirators. I should have said, and I am instructing you now, that in each instance where I stated, "co-conspirators," or, perhaps, "conspirators," I should have said, "the alleged, the al-

leged conspirators," or "alleged co-conspirators."

In other words, whether or not they were conspirators, it is for you, the jury to say, in your verdict, and not for the court to determine that fact.

I have also stated to you, during the instruction, about a person joining a conspiracy after it has already been formed. In other words, whether persons forming conspiracy, and then some outsider then comes in and, knowing the terms of the conspiracy, joins the conspiracy, the court's attention has been called to the fact that the indictment in this case does not charge a situation of that kind. The indictment charges a conspiracy was formed, a new, a fresh conspiracy, and so that any instructions that the court gave to the jurors with respect to anyone joining an existing conspiracy may be eliminated and forgotten, and only that portion of the instruction which the court gave you with reference to two or more persons forming, by agreement, understanding, and so on, a conspiracy to violate a law of the United States, is the portion of the charge that the court wishes the jurors and instructs the jurors to keep in their minds in deciding this case.

Finally, petitioners assert (Pet. 27–28) that they were irreparably prejudiced by the trial judge's action, in the course of his charge, in asking petitioners' counsel if it was correct to state that counsel had admitted that petitioners

"violated the provisions of the Regulation, as disconnected from any conspiracy, but that they did not agree and conspire to violate the Emergency Price Control Law under which the Regulation was written." Counsel replied: "That is right, your Honor. We never have questioned that matter, at all. We freely confessed our responsibility, and at no time have we challenged that." (R. 171.) We are unable to see how this colloquy placed counsel in a "highly embarrassing position," as petitioners argue. Counsel was only admitting what he had admitted throughout the trial and what the evidence clearly showed. Rather than being prejudicial, the judge's remarks were a reiteration of his earlier admonition to the jury (R. 161), which he repeated just before he asked counsel the question complained of, that petitioners "are not charged with the commission of the crime of violating the provisions of the Regulation; they are not charged with that. They are not charged with any violation of any substantive law, but they are charged with the violation of the Criminal Conspiracy Statute, of forming a conspiracy to violate." (R. 170–171.) These instructions and the question to counsel were clearly designed to impress the jury that petitioners were not on trial for their admitted substantive violations of the price ceilings, but could be convicted only if the jury found that they had entered into a conspiracy with the Ginns as alleged in the indictment. In the con-

text, the incident was helpful to petitioners, not harmful.

4. Petitioners' final contention is that the trial court failed to observe the requirements of Rule 32, F. R. Crim. P., in imposing sentence (Pet. 28–30).

Immediately after the announcement of the verdict and the polling of the jury, the court sentenced petitioners. Then, in the presence of petitioner Sandroff, the court asked defense counsel if he wished to say anything and counsel replied, "Not so far as the verdict of the jury is concerned." (R. 191.) In these circumstances, we think it is clear that petitioners were not deprived of "an opportunity to make a statement in his [their] own behalf and to present any information in mitigation of punishment," as provided by paragraph (a) of Rule 32.[4] As the Court of Appeals said (R. 247):

> While it would have been in appropriate conformity with the above rule had the district judge asked appellant Sandroff whether he desired to make a statement, it would appear from his inaction that Sandroff did not wish to do so. Though the judge posed the query, "Anything further?", neither appellant nor his attorney

[4] See *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 234 (C. A. 2), certiorari denied, 279 U. S. 863, decided before the Federal Rules of Criminal Procedure went into effect, holding that the trial judge's failure to inquire whether the defendants had any reason why sentence should not be imposed was not reversible error.

spoke up to the effect that Sandroff wished to be heard or to present information in mitigation of punishment. We cannot say that appellant was not afforded an opportunity to make a statement. There is nothing to indicate that he was shut off.

Petitioners have no standing to complain that there was no presentence investigation and report from the probation service of the court, in accordance with paragraph (c) (1) of Rule 32. In the first place, for aught that appears, such an investigation and report may have been made at the first trial. In any event, the provisions of paragraph (c) (1) are not mandatory upon the district courts, for it expressly provides that such a report shall be made "unless the court otherwise directs." *United States* v. *Karavias*, 170 F. 2d 968, 971–972 (C. A. 7).

CONCLUSION

There is no conflict of decisions and the case presents no question which warrants review by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1950.

APPENDIX

STATUTES, REGULATIONS, AND RULES INVOLVED

Criminal Code, Section 37, 18 U. S. C. [1940 ed.] 88:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Judicial Code, Section 42, 28 U. S. C. (1940 ed.) 103:

> When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

The Emergency Price Control Act of January 30, 1942, 56 Stat. 23, as amended (56 Stat. 767; 57 Stat. 566):

> SEC. 2 * * *
>
> (g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof [50 U. S. C. App. 902 (g)].

SEC. 4. (a) It shall be unlawful * * * to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing [50 U. S. C. App. 904 (a)].

SEC. 202 * * *

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity * * * to make and keep records and other documents, and to make reports * * * [50 U. S. C. App. 922 (b)].

SEC. 205 * * *

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment * * * [50 U. S. C. App. 925].

Maximum Price Regulation No. 30, 7 F. R. 9732; 8 F. R. 13049:

SEC. 1347.10 * * *

(b) Every person making purchases or sales of commercially packed wastepaper shall keep for inspection by the Office of

Price Administration for so long as the Emergency Price Control Act of 1942 shall remain in effect, complete and accurate records of each purchase or sale of wastepaper showing the following:

(1) Date of purchase or sale.

(2) Name and address of the buyer or seller.

(3) Grade of wastepaper purchased or sold.

(4) Quantity of each grade purchased or sold.

(5) Prices paid or received.

(6) Warranties, if any, given or received.

Such records shall set forth separately the f. o. b. point of shipment price, the origin and destination of the shipment, the means of transportation used, the amount of the transportation charge, and any other amounts paid or received in connection with such sale.

SEC. 1347.11 *Definitions.*

(a) When used in this Maximum Price Regulation No. 30, the term:

* * * * *

(5) "Commercially packed" means packed in machine compressed bales or by an optional method of packing where such method is allowed in the definition of a grade.

Rule 32, Federal Rules of Criminal Procedure:

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to

present any information in mitigation of punishment.

* * * * *

(c) Presentence Investigation.

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

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